84-709

No. _____

In the Supreme Court

OF THE

United States

October Term, 1984

UNITED STATES OF AMERICA ex rel. SEYMOUR BUXBOM,
Petitioner,

vs.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.,
a California corporation,
Respondent.

PETITION FOR CERTIORARI FROM THE NINTH CIRCUIT COURT OF APPEALS

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30 up

Seymour Buxbom respectfully petitions this Court for a unit of certiorari on the following grounds:

QUESTIONS PRESENTED FOR REVIEW

(1) Is your petitioner ("Buxbom"), relator below, entitled to recover the statutory penalty specified in 25 U.S.C. § 81 from the respondent ("Naegele")?

(2) When a non-Indian accepts money from an Indian tribe pursuant to a contract that has not been approved by the Secretary of the Interior, all in violation of 25 U.S.C. § 81, and where the penalty for such violation has been reduced to judgment by the relator, will the fact that the contracting parties thereafter seek and obtain Secretarial approval of the involved contract operate to deprive the relator of his right to collect the penalty?

LIST OF PARTIES

Seymour Buxbom, petitioner herein, was the relator/plaintiff in the United States District Court, and appellee in the Ninth Circuit Court of Appeals.

Naegele Outdoor Advertising Company of California, Inc., respondent herein, was the defendant in the United States District Court, and the appellant in the Ninth Circuit Court of Appeals.

Two parties were granted the status of amicus curiae in the Ninth Circuit appeal: 1) The Morongo Band of Mission Indians, and 2) The United States of America.

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To the Presiding Justice and Associate Justices of the Supreme Court of the United States:

I

REFERENCE TO REPORT OF OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals has been assigned the following citation by West Publishing Company: *United States of America ex rel. Seymour Buxbom vs. Naegele Outdoor Advertising Company Inc.* (1984, 9th Cir.) 739 F.2d 473. The opinion of the United States District Court was not published.

II

JURISDICTIONAL GROUNDS FOR REVIEW

The Opinion of the Ninth Circuit Court of Appeals was filed and entered August 3, 1984. There was no request for rehearing. This Court has jurisdiction to grant a writ of

certiorari under the provisions of 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

III

STATUTORY PROVISIONS INVOLVED

23 U.S.C. §81 provides:

Contracts with Indian Tribes or Indians

"No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or promising any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the spe-

cial thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

IV

STATEMENT OF THE CASE

On August 8, 1977, Naegele negotiated an outdoor advertising "lease" with the Morongo Band of Mission Indians, calling for the placement of fifteen billboards adjacent to Interstate Highway 10 on the Morongo Indian Reservation. This lease was submitted to the Superintendent of the Bureau of Indian Affairs ("BIA") for the approval required by 25 U.S.C. § 415, and, on August 29, 1977, the Superintendent denied approval, based on the fact that the contemplated billboards would violate the federal beautification

requirements specified in the Highway Beautification Act of 1965 (23 U.S.C. § 131), as enforced by the California Outdoor Advertising Act (California Business and Professions Code §§ 5200 *et seq.*) The Morongo Band of Mission Indians ("Band") initiated an administrative appeal of the Superintendent's decision, to the Sacramento Area Director, who, on March 14, 1978, affirmed the denial of approval by the Superintendent. Two weeks later, Naegele (acting in concert with the Band) initiated a cause of conduct designed to defy BIA and avoid Secretarial approval altogether.

On March 30, 1978, Naegele entered into an "agency agreement" with the Morongo Band. In general terms, Naegele would construct and maintain billboards on the Morongo Reservation, secure advertisers, and collect all the income from the signs. For the right to do this, Naegele paid the Band $250,000 (advance payment of 10 years annual fees at $25,000/years), plus $60,000 for the "privilege of being the Band's outdoor advertising agent." Additionally, the Band became obligated to pay Naegele $60,000 for the construction of the billboards. The agreement specifically provided that "no leasehold interest" was created by the contract. Naegele theorized that only "leases" were subject to BIA approval (under 25 U.S.C. § 415), and, since the agency agreement was not a "lease", no approval was necessary. Therefore, Naegele immediately commenced construction of the billboards *without* seeking BIA approval, and, pursuant to the agreement, accepted $60,000 from the Morongo Band.[1]

[1]The Morongo Bank appealed the Area Director's affirmance to the Interior Board of Indian appeals which, on December 13, 1979, concluded the beautification requirements did not apply to Indian trust land, and remanded the case to the Area Director with instructions to "effectuate" a new lease between Naegele and the Band. *Morongo Band v. Area Director* (1979) 86 I.D. 680. However, at the time judgment was rendered for the § 81 penalty, no new lease had ever been effectuated, and the agency agreement itself had not been submitted to the BIA for approval.

Based on these facts, your petitioner, a competitor of Naegele, initiated suit against Naegele in the United States District Court, Central District, seeking to collect the penalty specified in 25 U.S.C. § 81. The theory of the complaint was that, even if the "agency agreement" was not a "lease" subject to the approval requirements of 25 U.S.C. § 415, it was nevertheless subject to the more general "contract" provisions of § 81. The basis for federal jurisdiction is specified in 25 U.S.C. § 81.

On cross-motions for summary judgment, it was admitted that no approval of the agency agreement had been sought or obtained, and that, pursuant to the agency agreement, the Band paid Naegele $60,000. Naegele defended on the ground that § 81 did not apply to the agency agreement, that the Band was an indispensable party, and that the relator had no standing to bring the action. The District Court rejected these contentions and accordingly, on July 11, 1983, entered a $60,000 penalty judgment against Naegele — $30,000 to the United States for the benefit of the Morongo Band, and $30,000 to your petitioner as relator. Naegele appealed.

Initial briefing to the Ninth Circuit focused on the same defenses that Naegele presented to the trial court. However, shortly before oral argument, Naegele requested judicial notice of the following events: On October 27, 1983, the attorney for the Morongo Band requested the Sacramento Area Director to retroactively approve the agency agreement; on November 15, 1983, the Area Director directed the Superintendent to approve the agency agreement; and on February 2, 1984, the Acting Superintendent of the Southern California Agency for the BIA approved the agency agreement "retroactive to March 30, 1978." Therefore, at the time of oral argument, Naegele and amicus argued that, Secretarial approval having been obtained, the case was

now "moot." The Ninth Circuit ordered supplemental briefing from all parties concerning the effect of retroactive Secretarial approval upon the penalty judgment.

On August 3, 1984, the Ninth Circuit rendered an Opinion reversing the District Court, and remanding the case with directions to dismiss the relator's action. The Opinion concludes that, because the Secretary belatedly approved the agency agreement (almost six years after the agreement was signed and the money paid), the penalty must be forgiven. The Ninth Circuit concluded that the actual acceptance of tribal money by a non-Indian, pursuant to an unapproved contract, is not prohibited by 25 U.S.C. § 81, or at least is not subject to the penalty provisions of the statute, so long as the contract is approved *subsequent* to the payment of the money.

Your petitioner disagrees with this interpretation of § 81, and therefore seeks review here. Specifically, your petitioner contends that § 81 prohibits a non-Indian from accepting money from an unorganized Indian tribe, pursuant to contract, until such time as Secretarial approval is actually obtained. The acceptance of the money without first obtaining approval causes the § 81 penalty to accrue. Once the Congressionally-mandated statutory penalty has accrued, neither the Secretary of the Interior nor the judicial branch of government has the power to "forgive" the penalty simply because the offending party has subsequently conformed its conduct to the requirements of the statute. While subsequent Secretarial approval of a previously signed contract will be deemed "retroactive" to the date of signing, under the doctrine of relation back, for all equitable purposes, it cannot operate to relieve a party of statutory prescriptions against conduct which Congress has not only made subject to civil penalty, but also made subject to criminal prosecution.

V

ARGUMENT

25 U.S.C. § 81 (R.S. § 2103, August 27, 1958, 72 Stat. 927, based upon the Act of March 3, 1871, c. 120, § 3, 16 Stat. 570; as amended by the Act of May 21, 1872, 17 Stat. 136) has been broadly construed and strictly applied in order to protect Indian tribes. *Cf. Green v. Menominee Tribe* (1914) 233 U.S. 558, 565, 58 L.Ed. 1093, 38 S.Ct. 706; *McMurray v. Choctaw Nation* (1926) 62 Ct.Cl. 458, 495; *United States v. Southern Pacific* (9th Cir., 1976) 543 F.2d 676, 697; 18 Ops. Atty. Gen. 497; U.S. Solicitors' *Federal Indian Law* (1958 ed.) pp. 481-489.

The statute curtails the independent contractual capacity of those Indian entities to which it applies. In modern times, the statute has no application to individual Indians (who are now all citizens of the United States — see 43 Stat. 253), nor would it logically apply to tribes which, pursuant to the Indian Reorganization Act of 1934 (Act of June 18, 1935, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*), have acquired a Secretarially-approved constitution or corporate charter granting the tribe independent (but usually not unlimited) contractual powers. The Morongo Band, however, is an "unorganized" tribe without constitution or charter.

§ 81 declares that until such time as Secretarial approval is obtained, a tribal non-Indian contract is unenforcable ("void"). Further, the statute specifies that all money ... paid to any person by any Indian or tribe ... in excess of the amount approved by the ... Secretary ... may be recovered by suit in the name of the United States ... and one-half thereof shall be paid to the person suing for the same .. " That is, § 81 levies a penalty for taking tribal money without approval — the measure of the penalty being the amount of money taken in excess of the sum approved.

It was not disputed that Naegele in fact took $60,000 from the Morongo Band pursuant to a contract that had not, as of the date of judgment, been approved, or even submitted for approval. Naegele's principal argument was that the statute did not apply to the agency agreement, and therefore approval was unnecessary.

Subsequent to judgment, and more than five years after the money was paid, the agency agreement was in fact submitted to the BIA for approval, and, acting on behalf of the Secretary, the BIA approved the agency agreement retroactive to the date of execution. Based solely upon this fact, the Ninth Circuit reversed the judgment of the trial court, concluding that § 81 does not bar a non-Indian from accepting money from an Indian Tribe, pursuant to an unapproved contract, so long as approval is obtained *after* the money has changed hands.

Section 81 is a codified portion of the Act of May 21, 1872, 17 Stat. 136. When the Act is read as a whole, it is quite clear that Congress intended to bar non-Indians from taking tribal money before approval had been obtained. Indeed, after setting forth the qui tam provisions for recovery of the penalty ("all money . . . in excess of the amount approved"), the Act goes on to specify that "the person so receiving said money . . . shall, in addition to the forfeiture of said sum, be subject to prosecution for a misdemeanor . . ." *Cf.* 18 U.S.C. § 438) Further, any government employee who aids in the "making [of] said payments as are here prohibited" is subject to job disqualification.

Notwithstanding the fact that Naegele was clearly in violation of § 81 both at the time it took the Band's money, and at the time of judgment in the trial Court, the Ninth Circuit concluded that the Secretary's retroactive approval of the agency agreement deprived the relator of a cause of action to collect the statutory penalty. Your petitioner does

not dispute the power of the Secretary to retroactively approve conveyances of land, or even contracts of the character at issue here, under the equitable doctrine of relation back. *See Lykins v. McGrath* (1902) 184 U.S. 169, 46 L.Ed. 485, 22 S.Ct. 450. But the effect of retroactivity, however it may operate to make the contractual relationship valid and binding as between the contracting parties, cannot serve to excuse or forgive the interim violation of a statute of Congress. Fundamentally, the Secretary has no power to authorize conduct otherwise prohibited by statute, although the Ninth Circuit's opinion seems to give the Secretary that power.

More importantly, in forfeiture actions of this character, where the conduct involved is also a crime, there must be a time certain when the penalty actually attaches and the cause of action accrues. Under the Ninth Circuit's interpretation, the act of accepting tribal money without approval becomes a "contingent crime" — the contingency being whether or not, sometime in the far future, the transaction is exposed to secretarial scrutiny and ultimate approval. In other words, the penalty action never effectively accrues, and the relator cannot determine when he has an absolute right to collect the penalty. Even more perplexing would be the question of when the statute of limitations might begin to run on the penalty action, inasmuch as the limitation period specified in 28 U.S.C. § 2462 speaks in terms of commencing the action within 5 years from "that date when the claim *first accrued.*" The effect of the Ninth Circuit's interpretation of § 81 is that no relator would spend the attorney's fees and costs necessary to prosecute this statutory qui tam action for fear that, subsequent to judgment, the offending party would seek and obtain Secretarial approval of the contract, and by that method escape the penalty.

In *St. Regis v. United States* (1961) 368 U.S. 208, 227, 7 L.Ed. 240, 82 S.Ct. 289 this Court addressed the question of statutory penalties and noted that the judiciary has no power to "forgive statutory penalties once they legally attach . . ." Similarly, the Secretary of the Interior has no power to forgive statutory penalties once they legally attach, and his action in retroactively approving a contract should not be interpreted to have that effect. Under the Ninth Circuit's interpretation, the § 81 penalty "dis-attaches" upon subsequent secretarial approval — or else it never actually attaches at all. If the latter is true, then the qui tam provisions of § 81 have effectively been nullified by the Ninth Circuit's interpretation of the statute.

For these reasons, your petitioner respectfully requests this Court to review the judgment of the Ninth Circuit in this case, and restore to your petitioner his entitlement to the penalty specified in 25 U.S.C. § 81.

DATED: .....

Respectfully submitted,

SPRAGUE WHEELER
Attorney for Petitioner

APPENDIX A.

Memorandum

FILED JUNE 23, 1983 IN THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA. No. CV 82-6269 RG (MCx). UNITED STATES OF AMERICA ex rel. SEYMOUR BUXBOM, Plaintiff, v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., a California corporation, Defendant. Before: GADBOIS, District Judge:

This matter first came before the court on March 28, 1983 on defendant's motion to dismiss. At that time, plaintiff indicated he intended to file a motion for summary judgment. The court recalendared the motion to dismiss so that it could be heard with plaintiff's motion for summary judgment. Subsequently, defendant filed a motion for summary judgment. This case is now before the court on the parties' cross-motions for summary judgment. There being no disputed issues of material fact, summary judgment is appropriate.

This is a suit by plaintiff, Seymour Buxbom ("Buxbom"), pursuant to 25 U.S.C. § 81. As provided by that statute, Buxbom is suing in the name of the United States. Buxbom seeks to have this court declare null and void an agency agreement ("the agreement") between defendant, Naegele Outdoor Advertising Co., Inc. of California ("Naegele"), and the Morongo Band of Mission Indians ("the Band"). The Band is not a party to this action.

The Band's tribal lands, located in Riverside County, border interstate highway I-10. The Band took advantage of this location and entered the outdoor advertising business by erecting billboards on tribal lands adjacent to the highway. On March 30, 1978, the Band entered into an agency agreement with Naegele. Under the terms of the

agreement, Naegele became the Band's agent for the purpose of operating the Band's outdoor advertising enterprise. Naegele also agreed to construct 15 large billboards on the Band's lands. Pursuant to the agreement, Naegele paid the Band $310,000: $60,000 for the right to become the Band's agent and the balance, $250,000, as prepayment for the privilege of operating the Band's outdoor advertising enterprise for ten years. In return, the Band paid Naegele $60,000 to cover the costs it would assume in constructing the billboards, but the Band would own the billboards. It is the Band's payment to Naegele which is in dispute. The statute relied upon states:

> § 81. *Contracts with Indian tribes or Indians*
>
> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub.L. 85-770, Aug. 27, 1958, 72 Stat. 927.)
Approval of the Secretary of the Interior ("the Secretary") and the Commissioner of the Bureau of Indian Affairs ("the Commissioner") was sought neither for the agreement be-

tween Naegele and the Band nor for the payment of $60,000 from the Band to Naegele.

The facts in this case reveal why the parties did not seek the approvals required by 25 U.S.C. § 81. The 15 outdoor billboards erected by Naegele for the Band appear to violate the California Outdoor Advertising Act (California Business and Professions Code § 5200, *et seq.*). This act implements the provisions of the Federal Highway Beautification Act (23 U.S.C. § 131). The billboards' compliance with the Outdoor Advertising Act has been in litigation in the Superior Court for Riverside County, which found the billboards in violation of the act; however, this decision is now on appeal before the California Fourth District Court. This court notes that plaintiff is president of Desert Outdoor Advertising — a business competitor of Naegele's. It appears that plaintiff is using 25 U.S.C. § 81 to pursue a claim of unfair competition.

Plaintiff's argument for summary judgment maintains that all agreements between Indians and non-Indians not approved by the Commissioner and by the Secretary are prohibited by 25 U.S.C. § 81. Defendant contests this expansive interpretation of the statute and suggests that § 81 prohibits only non-approved contracts between Indians and non-Indians which:

> (1) involve payment to non-Indians of Indian funds received from the Federal government; and
>
> (2) involve payments to Indians made in consideration of services relative to Indian lands.

The court holds that plaintiff's broad interpretation of 25 U.S.C. § 81 is correct. *See Green v. Menominee Tribe,* 233 U.S. 558 (1914), 58 L.Ed. 1093, 38 S.Ct. 706; *Inecon Agricorporation v. Tribal Farms, Inc.,* 656 F.2d 498 (9th Cir. 1981).

Determining that 25 U.S.C. § 81 has broad effect, as plaintiff maintains, does not dispose of this case. Defendant's motion for summary judgment raises two crucial issues:

(1) the Band is both a necessary *and* an indispensable party which cannot be joined; and

(2) Buxbom lacks standing to bring this suit under Article III of the Constitution.

Both plaintiff and defendant agree the Band is a necessary party within the meaning of F.R.Civ.P. 19(a). The Band cannot be joined involuntarily as a party because Indian tribes enjoy the right of sovereign immunity from suit. Defendant contends that the Band is an indispensable party within the meaning of F.R. Civ.P. 19(b) and therefore should be dismissed. Naegele believes this lawsuit is effectively one to cancel the agreement between it and the Band. The Band is asserted to be indispensable because, if Buxbom prevails, the Band's rights will be affected.

This court does not hold that the Band is indispensable, but rather that complete relief can be accorded between plaintiff and defendant without the Band's joinder. The court is sensitive to the possibility that the Band's interests might be prejudiced in its absence. Here, however, there appear to be identical interests between Naegele and the Band. In the opinion of this court, Naegele's interests and those of the Band are so similar that the Band could not have been better represented had they been joined to this lawsuit.

Defendant believes Buxbom lacks standing to maintain this action because Buxbom has suffered no actual injury or harm. While it is true that Buxbom has not been harmed directly, 25 U.S.C. § 81 was enacted to protect Indians from being taken advantage of in business dealings with non-Indians. It confers upon any person the right to bring an

action under the statute in the name of the United States. Under this statute, the relator-plaintiff has exactly the same status and rights as the United States would if it were the plaintiff. This does not suggest, as defendant argues, that the Band has not been harmed by the agreement. Again, Section 81 reflects an overall Federal policy regarding business relations between Indians and non-Indians. The harm which confers standing to bring suit under Section 81 is a generalized harm to the expressed policy of Congress. Under Section 81, it is immaterial whether a relator-plaintiff or the Indian tribe involved has suffered actual harm.

Defendant's final argument is that the Band possesses sovereign rights over its lands. As such, the Band must be given broad latitude to enter into agreements with non-Indians for the conduct of tribal enterprises on tribal lands. On this basis, defendant asks the court not to set aside its agreement with the Band. The court finds this argument unconvincing. While Indian tribes and bands do possess many of the formal attributes of sovereignty, Indian sovereignty is limited by authority vested in Congress by the Constitution to enact regulations governing relations between the United States and the Indian tribes. Pursuant to this authority, Congress, in enacting 25 U.S.C. § 81, specifically moved to restrict Indians from exercising one of the attributes of sovereignty.

The language of Section 81 is clear, and the court must assume that Congress meant what it said. Accordingly, the agreement between Naegele and the Band must be set aside and plaintiff's motion for summary judgment must be granted. This decision is reached with considerable reluctance, since the heart of this action is really an unfair competition dispute between Buxbom and Naegele. The court cannot believe that Congress intended that Section 81 be used by a business competitor to void the contract of his

rival with an Indian tribe, especially when the latter was both represented by counsel and derived substantial benefits from the contract.

/s/ RICHARD A. GADBOIS, JR.
United States District Judge

DATED: June 23, 1983

APPENDIX B.

Judgment.

Filed July 8, 1983 in the United States District Court, Central District of California. No. CV-82-6269 RG (Mcx). United States of America ex rel. Seymour Buxbom, Plaintiff vs. Naegele Outdoor Advertising Company of California, Inc., a California corporation, Defendant.

Pursuant to the Order of the Court filed June 23, 1983, and entered June 24, 1983, granting plaintiff's motion for summary judgment, and incorporating the memorandum of opinion filed June 23, 1983 as the Court's findings of fact and conclusions of law, the Court now renders judgment as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Seymour Buxbom shall recover from Naegele Outdoor Advertising Company of California, Inc., the principal sum of $30,000, and;

2. The United States of America shall recover from Naegele Outdoor Advertising Company of California, Inc., the principal sum of $30,000, which sum shall be deposited into the United States Treasury and be held by the United States as trustee for the use and benefit of the Morongo Band of Mission Indians.

3. The relator Seymour Buxbom shall recover from Naegele Outdoor Advertising Company of California, Inc., his costs of suit herein incurred in this action.

Dated: July 8, 1983.

RICHARD A. GADBOIS, JR.
The Honorable Richard A. Gadbois, Jr.
Judge, United States District Court

APPENDIX C.

Opinion.

Filed August 3, 1984 in the United States Court of Appeals for the Ninth Circuit, No. 83-6020 D.C. No. CV 82-6269 RG (MCx). United States of America ex rel. Seymour Buxbom, Plaintiff-Appelle, vs. Naegele Outdoor Advertising Company of California, Inc., a California corporation, Defendant-Appellant. Appeal from the United States District Court for the Central District of California, Honorable Richard A. Gadbois, Jr. United States District Judge, Presiding. Argued: February 8, 1984, Submitted: May 2, 1984.

Before: Browning, Goodwin, and Kennedy, Circuit Judges.

KENNEDY, Circuit Judge:

Naegele appeals from summary judgment granted to Buxbom on a claim under 25 U.S.C. § 81 (1982). Because of recent action taken by the Bureau of Indian Affairs, we now reverse with instructions to inter judgment against Buxbom and to dismiss the action.

In March of 1978, the Morongo Band of Indians and Naegele Outdoor Advertising Company entered into a ten-year agency agreement under which Naegele would construct and maintain billboards on a portion of the Morongo reservation. The Band paid Naegele $60,000 to be used for the construction of the billboards; Naegele paid the Band $60,000 for the privilege of being the Band's agent and an additional $250,000, representing advance payment of ten annual fees of $25,000 each. The agreement had not been approved by the Bureau of Indian Affairs before these payments, and Buxbom brought suit against Naegele under the *qui tam* provision of 25 U.S.C. § 81. Buxbom sought a declaration that the agreement was void for failure to secure the BIA's approval and that pursuant to 25 U.S.C.

§ 81, the $60,000 received by Naegele from the Band should be forfeited, with Buxbom taking half and the United States taking the other half.

The agreement between the Band and Naegele was submitted to the Bureau of Indian Affairs in late 1983, after Naegele had filed their notice of appeal from the summary judgment. On February 3, 1984, just prior to oral argument, the BIA approved the agreement retroactive to 1978 under 25 U.S.C. § 415 (1982).

Buxbom admits that the BIA has the power to approve the agreement retroactively and that the approval precludes a judgment in this case that the agreement between the Band and Naegele is void. See *Indian Contracts — Approval Of*, 15 Op. Att'y. Gen. 585, 590 (1876). *Cf. Lykins v. McGrath*, 184 U.S. 169, 171-73 (1902) (upholding retroactive approval by the Secretary of conveyance of interest in land under the predecessor of 25 U.S.C. § 415); *Lomax v. Pickering*, 173 U.S. 26, 31-32 (1899) (same); *Pickering v. Lomax*, 145 U.S. 310, 315 (1892) (same); *Wishkeno v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 I.B.I.A. 21, 28-32 (Interior Bd. Indian App. 1982) (same). Buxbom nonetheless presses the suit to recover half of the $60,000 forfeiture.

We conclude that the BIA's retroactive approval of the agreement deprives Buxbom of an action under section 81. Buxbom argues that its rights under section 81 vested in 1978 when the $60,000 consideration passed from the Band to Naegele. But section 81 provides that "[n]o agreement shall be made . . . . unless . . . . [i]t shall bear the approval of the Secretary;" it does not provide that "no consideration shall be paid prior to approval by the Secretary." Thus, section 81's statutory penalty attaches only if the agreement at issue was made without BIA approval. Since the BIA's recent approval of the agreement is effective *nunc*

pro tunc, Buxbom's claim that the agreement violates section 81 must fail.

This result does not run afoul of due process restrictions on the power of courts or administrative agencies to forgive statutory penalties. *See St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961). The general principle ennunciated in *St. Regis* does not displace the more specific rule approved by the Supreme Court that the BIA may retroactively approve agreements between Indians and non-Indians. *Lykins*, 184 U.S. at 171-73.

In light of our disposition, we do not consider whether the agreement between the Band and Naegele is a lease subject to section 415 or a contract subject to section 81. The effect of the BIA's approval is the same in either event.

REVERSED AND REMANDED.

No. 84-709

In The

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA EX REL.
SEYMOUR BUXBOM,

Petitioner,

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC., a California corporation,

Respondent.

On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Where an Indian tribe has appealed to the Interior Board of Indian Appeals the refusal of an official of the Bureau of Indian Affairs ("BIA") to approve a proposed lease agreement with a non-Indian, and while the appeal was pending entered into a separate agency agreement without again seeking the prior approval of the Interior Department; and where the Interior Board of Indian Appeals has subsequently overruled the official's refusal and instructed the Bureau of Indian Affairs to effectuate a business lease, all prior to the filing of an action pursuant to 25 U.S.C. § 81 by a non-Indian business competitor of the non-Indian contracting party; does the BIA's failure to effectuate a lease until after the relator has obtained judgment for violation of section 81 bar the Court of Appeals from declaring the section 81 action moot when the BIA, pursuant to the request of the affected non-party Indian tribe, has approved the agency agreement as a lease, retroactive to the date when the tribe and the non-Indian entered into the agency agreement?

2. Was the Ninth Circuit Court of Appeals correct in holding (1) that standing to sue pursuant to 25 U.S.C. § 81 depends not on whether a tribe paid consideration prior to obtaining Secretarial approval but solely on whether the agreement has been approved by the Secretary, and therefore (2) that the relator's section 81 action became moot when the Interior Department approved the agreement retroactive to the date of its original execution by the affected Indian tribe and the non-Indian?

3. Where a penalty action pursuant to 25 U.S.C. § 81 is opposed by both the affected Indian tribe and the

United States Government; and where the Interior Department has, prior to the filing of any action pursuant to section 81, ordered the BIA to effectuate a business lease and the BIA has subsequently approved the subject agency agreement as a lease, retroactive to its original date of execution; should this Court reinstate the overruled District Court judgment, in spite of the adverse effect that judgment would have on the tribe and the narrowing effect it would have on tribal sovereign rights, for the sole reason that a symbolic consideration has passed from the affected tribe to the non-Indian prior to the retroactive approval of the agreement by the Interior Department?

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STATEMENT OF THE CASE

This was an action pursuant to 25 U.S.C. § 81 by Seymour Buxbom ("Buxbom"), the non-Indian owner of a competing outdoor advertising business (Desert Outdoor Advertising, Inc. ("Desert")), against Naegele Outdoor Advertising Company of California, Inc. ("NOAC"). Buxbom, as relator, alleged (1) that NOAC violated 25 U.S.C. §§ 81 and 415 by entering into an agency agreement with the Morongo Band of Mission Indians without obtaining the prior approval of the Secretary of the Interior and the Commissioner of Indian Affairs, and therefore (2) that NOAC was liable to Buxbom and the United States Government in an amount equal to sums allegedly paid to NOAC by the Band pursuant to the agency agreement, to wit, $60,000 ($30,000 to Buxbom and $30,000 to the United States Government).

The Morongo Band of Mission Indians is a sovereign, federally recognized Indian Tribe and the beneficial owner of the Morongo Indian Reservation, which is held in trust for the Band's exclusive use and benefit by the United States of America. *See Morongo Band of Mission Indians v. Area Director, Sacramento Office,* 7 Interior Board of Indian Appeals 299, 86 Int. Dec. 680, 681-82 (1979) (Morongo). Less than one square mile of the Band's 32,300 acre Reservation is suitable for commercial economic development. That square mile is a strip lying along the northern side of Interstate Highway 10, the major east-west artery for travel to and from metropolitan Southern California. *Id.*

In 1963, the Band's general membership delegated to the Morongo Tribal Council authority to negotiate out-

door advertising agreements. In late 1977 and early 1978, the Band conducted negotiations with several outdoor advertising businesses, including Desert and NOAC. See *Moronga, supra,* 86 Int. Dec. at 683-84 n. 7. On the basis of the more favorable terms offered by NOAC, the Band negotiated a lease with NOAC.

Since 25 U.S.C. § 415 and 25 C.F.R. § 162 require the approval of the Department of the Interior for such leases, the Band and NOAC submitted the lease to the local Bureau of Indian Affairs office for approval. That local office disapproved the lease on the ground that it violated the federal Highway Beautification Act (23 U.S.C. §§ 131 *et seq.)* (HBA) and the California Outdoor Advertising Act (Cal. Bus. & Prof. Code §§ 5200 *et seq.*). On March 14, 1978, the Area Director of the BIA upheld the disapproval. The Band then appealed to the Commissioner of Indian Affairs, who did not act on the appeal within the 30 days required by 25 C.F.R. § 2.19(a). The appeal therefore was automatically referred to the Interior Board of Indian Appeals. *See* 25 C.F.R. § 2.19(b) (1983).

On Deecmber 13, 1979, the Interior Board of Indian Appeals reversed the decision of the Area Director and remanded the case to the Acting Deputy Commissioner of Indian Affairs, with instructions that the BIA "seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion." *Morongo, supra,* 86 Int. Dec. at 692. The Board's action was that of the highest authority within the Department of the Interior and is final for the Department. *Id.; see* 43 C.F.R. § 4.1 (1983).

On March 30, 1978, while the Band's appeal of the Area Director's decisions was still pending, the Band and NOAC entered into a written agency agreement. Pursuant to the agency agreement NOAC agreed to and subsequently did install and operate 15 outdoor advertising signs on the Morongo Reservation. It paid the Band $310,000, $60,000 for the right to become the Band's agent and $250,000 as prepayment for the privilege of operating the Band's outdoor advertising business for ten years. Sixty thousand dollars of the $310,000 was immediately returned to NOAC by the Band, in recognition of the fact that NOAC was to bear the entire cost of building this part of the Band's outdoor advertising sign plant. Except for the return of the $60,000 of the $310,000 NOAC had paid it, the Band never paid any money to NOAC.

Buxbom filed his complaint in this action on December 3, 1982. The Morongo Band was not named as a defendant. On February 28, 1983, NOAC moved to dismiss on the grounds (1) that the Morongo Band was an indispensable party that had not been (and could not be) joined; (2) that NOAC, as the Band's agent, was protected by the Band's sovereign immunity to suit; and (3) that the agency agreement was not within the purview of section 81's proscription. The motion was argued on March 28, 1983. At the conclusion of the hearing, the District Court took the motion off calendar, to be recalendared after plaitniff had filed a motion for summary judgment.

In June 1983 the District Court heard oral argument of NOAC's and Desert's cross-motions for summary judgment, and on June 23 the Court filed its memorandum opinion by which it (a) denied NOAC's motions to dismiss and for summary judgment; (b) granted Buxbom's summary

judgment motion, on the sole ground that NOAC had failed to comply with the requirements of 25 U.S.C. § 81; and (c) set aside the agency agreement between the Band and NOAC. On July 8, 1983, the district court filed a judgment awarding $30,000 to Buxbom and an equal amount to the United States of America.

NOAC then appealed to the Ninth Circuit Court of Appeals. Opening, opposition and reply briefs were filed; the Court granted the petitions of the Morongo Band and the United States Government for leave to file *amicus curiae* briefs. By a petition for judicial notice filed on February 3, 1984, appellant NOAC apprised the Ninth Circuit of the fact that on February 2, 1984, the Acting Superintendent for the Southern California Agency of the Bureau of Indian Affairs, at the direction of the Area Director, had approved the Morongo-NOAC agency agreement, retroactive to March 30, 1978, the date when the agency agreement originally was entered into by NOAC and the Band. (*See* Appendix.)

On February 8, 1984, the Ninth Circuit heard oral argument of NOAC's appeal, and at that time it requested the parties to prepare supplemental briefs regarding the following questions: (1) what the effect was of the February 2, 1984 written approval issued by the Bureau of Indian Affairs, including in particular the question whether the written approval was properly retroactive to March 30, 1978; and (2) whether the action should be remanded to the District Court for determination of the above questions and for reconsideration of what relief, if any, was proper. All parties submitted briefs as requested by the Court, and on May 7, 1984, NOAC filed its Notice of Motion Requesting *Munsingwear* Disposition, by which it moved the

Ninth Circuit for an order reversing and vacating the District Court decision below and remanding the action to the District Court with directions to dismiss it.

On August 3, 1984, the Ninth Circuit Court of Appeals issued its Opinion reversing the decision of the District Court and remanding the case with directions to dismiss the relator's action. *United States ex rel. Buxbom v. Naegele Outdoor Advertising Company of California, Inc.*, 739 F.2d 473, 474 (9th Cir. 1984) (Buxbom).

ARGUMENT

1. Buxbom's Single Claim Is That The Decision Below Was Wrong As A Matter Of Law.

Buxbom's petition for certiorari is limited solely to the claim that the decision below is erroneous. He does not claim that the Ninth Circuit has rendered a decision in conflict with any other federal appellate decisions, nor does he claim that the Ninth Circuit has decided any federal question in a way that conflicts with the decision of a state court of last resort. *Cf.* Sup.Ct.R. 17.1(a). He does not even go so far as to say that the question of which he seeks review is important or conflicts with applicable decisions of this Court. *Cf.* Sup.Ct.R. 17.1(c). Buxbom's grounds for seeking relief of the decision below are limited apparently to the sole contention that the decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Cf.* Sup.Ct.R. 17.1(a).

In the decision below the Ninth Circuit affirmed that the BIA had the power to approve the agency agreement

retroactively and that such approval precluded any judgment that the agreement between the Band and Naegele is void. *Buxbom, supra,* 739 F.2d at 474. It then rejected Buxbom's contention that his rights under section 81 had vested when the $60,000 "payment" passed from the Band to NOAC, on the ground that section 81's statutory penalty attaches *only* if the agreement at issue is made without BIA approval; it does not make actionable a payment simply because it occurs prior to a *nunc pro tunc* approval of an agreement by the Interior Department. *See id.*

Buxbom challenges this holding on what is essentially a single ground. He argues that section 81, notwithstanding its language, levies a penalty for taking tribal monies without the approval of the Secretary and the Commissioner (Brief for Petitioner at 7); he says it is undisputed that NOAC "took" $60,000 *(id.* at 8) and that the BIA's retroactive approval cannot operate to "forgive the interim violation of the statute . . ." *(id.* at 9). He contends that any construction other than his would effectively prevent the allegedly applicable statute of limitations from ever accruing. *Id.* And he suggests that 18 U.S.C. § 438, which prescribes a criminal punishment to be imposed against anyone who "receives money *contrary to* sections 81 and 82 [of Title 25] . . . " (emphasis added), supports his construction of section 81. *Id.* at 8.

NOAC respectfully submits that these contentions are without merit. Further, to decide this case in the manner suggested by Buxbom (1) would be contrary to the basic purpose of section 81 and (2) would frustrate both the exercise by the Interior Department of its supervisory responsibilities and the current congressional and execu-

tive policy favoring attempts by Indian tribes to better themselves economically. Finally, even assuming Buxbom's interpretation of when a cause of action arises under section 81 is correct, he has lacked standing to bring this action since December 13, 1979, when the Interior Board of Indian Appeals decided *Morongo*.

2. Buxbom's Arguments Against The Ninth Circuit's Interpretation Of Section 81 Are Without Merit.

In its present form 25 U.S.C. § 81 (Act of March 3, 1871, ch. 120, § 3, 16 Stat. 570, *amended by* Act of May 21, 1872, ch. 177, §§ 1-3, 17 Stat. 136, *codified as amended at* 25 U.S.C. § 81) provides that certain agreements are "null and void" unless executed in compliance with five listed conditions, the second of which is that the agreement "must bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it." The final paragraph of section 81 provides not only that agreements that do not comply with the five listed requirements "shall be null and void . . ." but that:

> [A]ll money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid to the Treasury for the use of the Indian or tribe by or for whom it was so paid. *Id.*

The first and most obvious defect in the argument proffered by Buxbom is that it ignores the language of the

statute. As the Ninth Circuit observed, section 81 does not state that "no consideration shall be paid prior to approval by the Secretary." Rather, it provides that "[n]o agreement shall be made . . . unless . . . [i]t shall bear the approval of the Secretary . . . indorsed upon it." Section 81's penalty attaches, therefore, only if the agreement in question lacks BIA approval. In this case the BIA approved the agency agreement *nunc pro tunc* to the date of its original execution. Buxbom's action therefore fails.

Buxbom does not challenge the above interpretation directly. Rather, he attempts to demonstrate that it jars with related statutes and is unworkable. Thus, he first calls to our attention 18 U.S.C. § 438, which specifies what criminal punishment shall be imposed upon one who "receives money *contrary to* sections 81 and 82 . . . " (emphasis added). *See* Brief for Petitioner at 8. However, section 438 adds nothing to our understanding of 25 U.S.C. § 81. It comes into play only if there has already been a violation of section 81; it sheds no light on when, and under what circumstances, a violation of section 81 will be deemed to have occurred.

Buxbom next argues that the Ninth Circuit's interpretation of section 81 is unworkable because it transforms the unauthorized acceptance of tribal monies into a "contingent crime," that is, a violation that might never accrue because there would always be the possibility that the BIA would someday approve retroactively an agreement otherwise violative of section 81. Brief for Petitioner at 9. In effect, Buxbom is saying that where, as here, a BIA official has refused to approve an agreement and thereupon the *affected tribe* has (1) appealed the refusal and (2) proceeded to enter into a contract with a non-Indian, a re-

lator may, pursuant to section 81, sue for and recover whatever sum was paid by the affected tribe to the non-Indian, regardless of whether the original agreement is in the end approved by the Interior Department, and regardless of the fact that the approval of the contract relates back to the date when the parties entered it.[1]

Buxbom's interpretation is, not surprisingly, concerned first and foremost with whatever opportunities for third party profit are created by this statute. It is not in keeping with what obviously was the primary purpose of section 81, namely, the protection and betterment of Indians and tribes. *See* Cong. Globe, 41st Cong. 1st Sess. 1483 ff. (Feb. 22, 1877). The correct theory of accrual is the one suggested by the Interior Department's current regulations governing the appeal of BIA administrative actions, to wit, that no claim under section 81 accrues until there has been final agency action on whether a proposed tribal-non-Indian agreement shall be approved.

Under the BIA's current regulations, this appeal period is thirty-one days from notice of the decision complained of. *See* 40 Fed. Reg. 20626 (May 12, 1975), *codified as*, 25 C.F.R. § 2.10(a) (1983). If an administrative appeal has timely been filed by an Indian or tribe, the right of a relator to sue for damages under section 81 does not accrue until there has been final agency action. Of course, if the Interior Department finally approves

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[1] It should be noted that Buxbom's argument assumes the applicability of section 81 to the agreement in question. In effect, Buxbom is arguing that the BIA's retroactive approval does not relieve this Court from having to determine whether the agency agreement is subject to section 81. The Ninth Circuit wisely avoided this issue in its decision below. *See Buxbom, supra*, 739 F.2d at 474.

the proposed lease or other agreement, the approval precludes any claim pursuant to section 81.

This alternative interpretation of what triggers the right to sue under section 81 is far preferable to Buxbom's theory of accrual under section 81. His interpretation would have a serious chilling effect on the willingness of non-Indnans to make contracts with Indians or tribes, since non-Indians would enter such contracts only where they were willing to wait a considerable length of time before being able to commence performance under the contract. Further, for each contract lost because the parties were unwilling to risk such substantial delays, the Department of Interior would lose the opportunity to decide what agreements it would approve (and subject to what conditions), and as a result it would lose an opportunity to make policy in this area. Finally, and by no means least significant, Indians and tribes would in the long run lose significant opportunities to better themselves economically and, by a process of trial and error, to determine what contracts, if any, are outside the scope of section 81 and within the scope of inherent tribal sovereign powers.

In this case the Morongo Band timely appealed to the Interior Board of Indian Appeals, which vacated the Sacramento Area Director's disapproval of the proposed lease and remanded the matter to the Acting Deputy Commissioner of Indian Affairs with instructions that the BIA "seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion." *Morongo, supra,* 86 Int. Dec. at 692. Thereafter, the BIA failed to take formal steps to implement these instructions until October of 1983, when counsel for the Morongo Band wrote the Area Director and requested the BIA to effectuate a business lease as directed

by the Interior Board of Indian Appeals. *See* Feb. 2, 1984 Approval of the Acting Superintendent, Bureau of Indian Affairs, Southern California Agency & Exh. A thereto (Appendix A hereto). Thereupon the Area Director completed the process of complying with the Interior Board of Indian Appeals' order of 1979 by formerly according retroactive approval to the March 30, 1978 agency agreement.

For the reasons set forth above, this Court should refuse Buxbom's petition and leave undisturbed the decision of the Ninth Circuit, which respects the plain language of section 81, permits the unimpaired exercise of the Secretary's supervisory powers, and avoids encroaching on tribal sovereignty and tribal attempts at economic self-development.

3. Even Assuming The Validity Of Buxbom's Interpretation Of Section 81, He Lost Standing To Bring This Action In December 1979.

The formal approval accorded the agency agreement on February 2 of this year originally was ordered by the Interior Department in December 1979. *See Morongo, supra.* Thus, Buxbom actually brought his lawsuit *after* the Interior Board of Indian Appeals had ordered the BIA to effectuate a lease between NOAC and the Morongo Band. Consequently, even if Buxbom is correct that the right of action conferred by section 81 was triggered when the Morongo Band made an unapproved "payment" to NOAC, Buxbom's right to bring an action to recover the amount of that payment expired when the Interior Department concluded that the proposed lease agreement between NOAC and the Band was legal and should be approved. As a result, Buxbom lost whatever standing he may once have had to bring this lawsuit when the BIA issued its opinion in *Morongo, supra.* To decide other-

wise would be to hold that Buxbom could recover the section 81 penalty simply because the Interior Department, for reasons best known to it, had refrained from completing the formality of according written approval to the agency agreement.

Buxbom's action is really nothing but an attempt to challenge the Interior Department's final determination that the agency agreement between the Band and NOAC should be treated as a lease and granted retroactive approval. Section 81 grants no standing to bring an action of this kind.

The possibility remains of course that the agency agreement was not a section 81-type contract — in which case section 81 was never violated and Buxbom has no standing to bring this action. The upshot is that even under Buxbom's interpretation of when a right of action under section 81 accrues, his action either is untimely (and thus he has no standing) or it could not have been brought in the first place.

———o———

CONCLUSION

For the foregoing reasons respondent NOAC respectfully requests that this Court deny Buxbom's petition for writ of certiorari.

Dated: November 27, 1984.

BEST, BEST & KRIEGER

by /s/ RICHARD CROSS
Attorneys for Naegele Outdoor
Advertising Company of California, Inc.

APPENDIX

Approved for a period of 10 years retroactive to the execution of the Agency Agreement on March 30, 1978 as entered into by Thomas Lyons, Chairman, Morongo Band of Mission Indians and Leon E. Howell, President, Naegele Outdoor Advertising Company of California, Inc.

This document is executed pursuant to Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, which specifies under Section 2.3, that the Superintendent may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Acting Superintendent, Southern California Agency, herein exercises the redelegated authority. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

Where references are made to the Band as to approvals, consents and authorizations, the words "and the Secretary" will be added after Band.

Approved in accordance with the letter of the Area Director, Sacramento Area Office, dated November 15, 1983, a copy of which by this reference is made a part hereof. See Exhibit "A".

Approved February 2, 1984 reactive [*sic*] to March 30, 1978.

/s/ William H. Gianelli
Acting Superintendent
Pursuant to the authority delegated by 209 DM 8, 10 BIAM 3.1, and Sacramento Area Office Redelegation Order No. 1 (43 F.R. 30131).

EXHIBIT "A"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

(SEAL)

November 15, 1983

Barbara E. Karshmer, Esq.
Attorney at Law
925 N Street, Suite 150
Fresno, California 93721-2256

Dear Ms. Karshmer:

This refers to your letter of October 27, 1983, concerning an Agency Agreement between the Morongo Band of Mission Indians and Naegele Outdoor Advertising Company. The matter was the subject of a decision from the Interior Board of Indian Appeals which held that a contemplated lease of certain lands on the Morongo Indian Reservation for outdoor advertising purposes would not be regulated by State law or the Highway Beautification Act.

Your letter requests that the Bureau of Indian Affairs seek to "effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company", as directed by the Interior Board of Indian Appeals, in the approval of the agency agreement executed between the Band and Naegele, on March 30, 1978. You further requested that said approval be issued retroactively to March 30, 1978, in view of the Interior Board of Indian Appeals' decision and in order that the Band may attempt to persuade the Ninth Circuit Court of Appeals to remand the case of *U.S. ex rel Buxbom v. Naegele,* to the District Court for a new decision in light of the changed facts.

Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, specifies under Sec. 2.3, that the Super-

intendents and the Director, Palm Springs Office, may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Superintendent, Southern California Agency, by copy of this letter, is requested to exercise his redelegated authority with respect to your request. You are requested to provide the Superintendent, with the original agreement, if at all possible. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

It is suggested that where references are made to the Band as to approvals, consents and authorizations, that "and the Secretary" be added after Band.

Sincerely,
/s/ JESS T. TOWN
Area Director

cc: Superintendent, SCA, w/copy of incoming for action.